89-1320

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF FLORIDA,

Petitioner,

V.

CHARLES LEWIS BURR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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58 pp

QUESTION PRESENTED

ON REMAND FROM THIS COURT IN BURR V. FLORIDA, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988), THE FLORIDA SUPREME COURT ERRONEOUSLY APPLIED JOHNSON V. MISSISSIPPI,. ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 525 (1988), IN VACATING THE DEATH SENTENCE AND ORDERING A NEW SENTENCING PROCEEDING.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	7
REASON FOR GRANTING THE WRIT	30
CONCLUSION	41

TABLE OF CITATIONS

CASES	PAGE(S)
Bryan v. State, 533 So.2d 744 (Fla. 1988)	39
Burr v. Florida, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988)	5,30
Burr v. State, 550 So.2d 44 (Fla. 1989)	1,5,31,33
Burr v. State, 518 So.2d 903 (Fla. 1987)	4,30
Burr v. State, 466 So.2d 1051 (Fla. 1985), cert. denied, 474 U.S. 879 (1985)	4
Dowling v. United States, __ U.S. __, 3 F.L.W. Fed. S1026 (Decided Jan. 10, 1990)	32
Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988)	38
Green v. Georgia, 442 U.S. 95 (1979)	40

TABLE OF CITATIONS

CASES — PAGE(S)

Johnson v. Mississippi,
486 U.S. 578,
108 S.Ct. 1981,
100 L.Ed.2d 575 (1988)
.....*passim*

Jones v. Butler,
864 F.2d 348
(5th Cir. 1988).....38

Richardson v. Johnson,
864 F.2d 1536
(11th Cir. 1989).....36

Satterwhite v. Texas,
486 U.S. ___,
108 S.Ct. ___,
100 L.Ed.2d 284 (1988)...40

Zant v. Stephens,
462 U.S. 862 (1983).....33

STATUTES AND CONSTITUTIONS

Florida Statutes (1981)

Section 921.141.....2

United States Code, Annotated

Section 1257(3).....2

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CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Florida on remand, Burr v. State 550 So.2d 444 (Fla. 1989), is set forth in Appendix A. The denial of Petitioner's motion for rehearing is unreported and is set out in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered August 31, 1989, and Petitioner's timely filed rehearing was denied November 15, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The case involves the Eighth and Fourteenth Amendments to the United States Constitution. Also involved is Section 921.141, Fla. Stat. (1981), as it relates to the correctness of the sentence of death imposed.

STATEMENT OF THE CASE

Burr was indicted by the Leon County grand jury on October 29, 1981, and was charged with murder in the first degree and robbery with a firearm. (R 1-2). The State pretrial filed a notice of intent to rely on similar fact evidence on April 6, 1982. (R 37-38). Burr filed a motion in limine on May 26, 1982, however, said motion was denied after a pretrial hearing. (R 355-394). The court found a sufficient basis to allow the admission of similar fact evidence as to other robberies committed by Burr for which he had not gone to trial at the time of the instant trial.

Burr was ultimately convicted of first degree murder. Following the penalty phase wherein the State produced no additional evidence as Burr called

several witnesses in mitigation, the jury returned a recommendation of life. (R 292). The trial court overruled the jury's recommendation and imposed a death sentence.

On direct appeal, the Florida Supreme Court affirmed both the conviction and sentence of death. Burr v. State, 466 So.2d 1051 (Fla. 1985), cert. denied, 474 U.S. 879 (1985).

Burr then sought collateral review in the state trial courts on October 1, 1987. Relief was denied and on December 10, 1987, the Florida Supreme Court affirmed said denial in Burr v. State, 518 So.2d 903 (Fla. 1987). Certiorari review was sought and this Court granted review, vacated the decision below and remanded for further consideration in light of Johnson v.

Mississippi, 486 U.S.578_, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), in Burr v. Florida, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988).

Supplemental briefs and further oral arguments were submitted to the Florida Supreme Court, and on August 31, 1989, in Burr v. State, 550 So.2d 444 (Fla. 1989), that court vacated the death sentence and remanded for a new sentencing proceeding. Because the jury recommended a life sentence, the Florida Supreme Court remanded to the trial court to reconsider the aggravating circumstances versus the mitigating circumstances without the influence of similar fact evidence.

Rehearing was sought by Petitioner asserting that the similar fact evidence was not admitted in violation of Johnson

v. Mississippi, supra. Moreover, Petitioner argued that the underlying facts of the robbery for which an acquittal resulted were properly before the trial court at sentencing. Rehearing was denied November 15, 1989, without opinion.

The instant Petition for Writ of Certiorari is being filed as a result of the Florida Supreme Court's misapplication of Johnson v. Mississippi, supra, to the penalty phase of Burr's trial.

STATEMENT OF THE FACTS

The following testimony was adduced at the trial held June 9 and 10, 1982:

Domita Williams identified Burr as the man who picked her up at her house at about 6:30 a.m. in order to take her to work on August 20, 1981. (R 830). By that date, Williams and Charlie Burr, had been going together for two or three weeks and were talking of marriage. (R 832, 856). Burr went inside Williams' house and 15 or 20 minutes later, or shortly before 7:00 a.m., the couple left the house on Mount Sinai Road, heading towards Tallahassee on Highway 27. (R 833-834). About 7:00 a.m., Burr pulled into the parking lot of a Suwanee Swifty convenience store and waited until Williams went inside. (R 834).

Williams knew the victim, who was the store clerk, as "Steve" because she had stopped at this convenience store before. (R 834). No one besides the clerk was in the convenience store while she and Burr were there, and no one was in the parking lot area. (R 835). About five or ten minutes later, Williams came out of the store with a cheeseburger and Kit-Kat candy bar she had purchased. (R 834, 850). Burr then got out of the car and went inside the store. (R 835). Williams began eating her sandwich. She could see the upper part of Burr and the victim from the car. (R 836). After hearing a gunshot, she looked up and saw Burr but not the victim. (R 836, 837, 852, 853). Burr then returned to the car, smiling. Williams was crying because "he [Burr] had shot Steve" and she had "never

witnessed anything like that before. . ." (R 837). Burr asked Williams what was wrong. Williams testified that Burr was wearing blue jeans and a "Master Red" shirt at the time (R 838), and further identified State's exhibit number one as being Burr's shirt. (R 839). Williams noticed a pistol-type handgun imprint in Burr's pocket. (R 838).

Williams further testified that after the incident at the convenience store, she and Burr drove to an apartment where Burr was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tammy Footman, a cousin of Williams, who were present in the apartment, what had happened at the store and what she had seen. (R 840).

Subsequent to the apartment visit, Williams was taken to work at Sunland by Burr and once there, she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell the truth about what happened. (R 841). Williams never contacted the police. (R 8420. Williams worked at Sunland August 20 and 21. (R 842). On August 21, she and Burr drove to Melbourne in his car. (R 843). Before they left, Burr picked up a cardboard box containing about 25 handguns. (R 844). Williams was present when Burr subsequently sold these handguns in Melbourne. (R 8440.

Williams specifically stated that she did not drive her mother to work on August 20, 1981, and that her mother had driven her own car to work on that day. (R 845). She also testified that

someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true. (R 845).

On cross-examination, it was established that Williams was afraid of Burr and apparently feared for her baby. (R 856, 857). Williams denied telling her mother or anyone else that she had lied in her statement to Sgt. Charlie Ash, an investigator with the Sheriff's Department, and that her mother was lying about August 20, 1981. (R 858-861).

On redirect examination, Williams explained her fear of Burr and testified the he did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

Kim Miller, a regular customer, testified next. He stopped at the

Suwanee Swifty at about 7:00 a.m. on August 20, 1981, and found the body of Stephen Harty, the clerk, lying over an open safe. (R 866, 871). He dialed the 911 emergency number at 7:09 or 7:10 a.m. (R 868). He identified State's exhibit number two as being a photo of the victim in the condition he found him. The crime scene was not disturbed prior to the authorities arriving. (R 867).

Robert Bailey, a paramedic, responded to Kim Miller's 911 call, and discovered the victim to have a bullet wound behind his left ear and determined he to be dead. The victim appeared to be on his knees. (R 871). Miller's call came in at 7:09 a.m. (R 870).

Deputy Ray Wood secured the area thereafter and did not allow the area to be disturbed. (R 874).

Johnny McCord, a supervisor for Suwanee Swifty, testified that $252.75 was missing from the store's register and safe. (R 877, 878).

Bill Gunter, a crime scene technician, described the store for the jury via photographs. (R 881, 882). He also identified State's exhibit number five as being bullet fragments removed from the victim's heat. He received those from Dr. Wood during the autopsy. (R 887-889).

Charlie Ash, Jr., an investigator with the Leon County Sheriff's Office, testified that he arrested Burr on September 29, 1981, after conducting an investigation. He also recovered Burr's "Master Red" shirt from Domita Williams. (R 903).

Sam Bruce, another sheriff's investigator, recovered two .22 caliber bullets from the apartment where Burr was staying prior to his arrest. (R 905-906). Burr's counsel stipulated to the admissibility of the bullets. (R 908, 909). Donna Cormier testified only in order to provide the chain of custody of the "Master Red" shirt and it was admitted into evidence. (R 910).

Don Champagne, a firearms examiner for the Florida Department of Law Enforcement, testified that the fragments removed from the victim's head were the remains of a .22 caliber bullet. (R 913). The fragments were entered into evidence. (R 914).

Katrine Jackson verified Domita Williams's prior testimony. On August 20, 1981, Williams came to the apartment

and was tense and nervous. Burr acted abnormally later in the day. Williams told her about what she had seen happen at the store earlier that morning. (R 921-922). Jackson allowed officers to search Burr's room on September 29, 1981. (R 921,922). On cross-examination, however, Jackson testified that Williams had not told her that she had been at the convenience store with Burr. (R 923). The first indication that the trial would take unexpected paths occurred at this point; Jackson's testimony surprised the prosecutor. (R 924-956). Jackson eventually took the stand again and admitted she lied on cross-examination. (R 956-957). Jackson then testified that Williams did tell her about what Burr did at the convenience store the morning of August 20, 1981. (R 957-958).

Dr. Thomas Wood's deposition was read to the jury by agreement. Dr. Wood performed the autopsy on Steve Harty, the victim. (R 964). He found a bullet wound behind the left ear. (R 965). The autopsy revealed that the shot was fired from close range and that the gun's relative position to the victim's head would have been behind the victim's head, slightly to the left, and probably pointed downward somewhat. (R 966). Death was rapid and no purposeful motion on the part of the victim would have been likely after the shot was fired. (R 967-968). Dr. Wood's findings were consistent with the victim being shot while on the floor. (R 969).

At this point in the trial, the similar fact evidence was proffered and deemed admissible by the trial court. (R 975-1042).

Emil Farrell worked at a Majik Market convenience store in Palm Bay, which is in the vicinity of Melbourne. (R 1050). On Saturday evening, August 22, 1981, he got a phone call at home from someone asking him who was working at the store the next morning. (R 978). Farrell replied that he was. The next morning, Sunday, August 23, Farrell received another phone call asking who was working. He again said he was. (R 1051).

At about 8:00 a.m., Burr went into Farrell's store and stood by the microwave until the store was empty. He approached Farrell and asked him if his name was Farrell. When Farrell said yes, Burr asked him if he had ever seen him. Farrell said no. Burr then pulled out a gun and said, "I'm going to kill you. Open the register." (R 1051,

1052). Burr had brought several items to the register area prior to pulling the gun. (R 1052). He told Farrell two more times to open the register. Without getting any money and without any provocation on Farrell's part, Burr shot Farrell twice with a small caliber gun. (R 1052-1053, 1060).

With Burr still inside the store, Farrell ran outside and asked a customer, who had just driven up, for help. (R 1055). The man fled and Burr ran out of the store, jumped into a rather small, old blue or green car, and left. (R 1058). This occurred three days after the Hardy murder. Farrell identified Burr from among many photographs shown to him. (R 1056, 1057).

James Griffin worked in a Majik Market convenience store in Port Malabar, also near Melbourne, Florida. (R 1061). Griffin was preparing for clean-up late in the evening on August 28, 1981, and was by himself in the store when Burr came in. (R 1061-0162). Burr pulled out a small caliber handgun and said, "Give me all your money and don't be no fool." (R 1063). After Griffin had given him the money, Burr stepped back and shot Griffin once in the abdomen. Griffin said he " would get him for this" and turned. Burr then shot him in the left elbow and left in a brown or maroon car. (R 1063, 1065). This occurred eight days after the Hardy murder and five days after the Farrell shooting.

Lloyd Lee worked in a 7-11 convenience store in Melbourne. About

midnight on September 8, 1981 (twelve days after the Hardy murder), Lee was alone in the store. Burr came in, picked up some items, and came to the cash register. (R 1069-1070). As Lee rang up the items, Burr pretended to reach for a wallet, but pulled a small caliber gun instead. (R 1069-1070). After getting the money, he told Lee to "be cool," then turned to leave. He turned back, however, and shot Lee twice. (R 1070). The shooting was without provocation. (R 1071). Burr walked rapidly away. (R 1072). Lee identified him from hundreds of photographs. (R 1073). The State rested. (R 1076).

The defense's case began with testimony from a series of customers who arrived at the Suwanee Swifty store on August 20, 1981, from shortly after 7:00

a.m. until approximately 7:10 a.m. All saw Steve Hardy alive.

Clarence Lohman arrived about 6:50 a.m. and left right after 7:00 a.m. (R 1078). As he was leaving, two other cars drove up. (R 1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away. (R 1082-1083). A tall young man drove up as Prichard drove off. (R 0183). Although Prichard drove away, two minutes later he drove past the store, after he had picked up some men. (R 1086). As he drove by, he saw Kim Miller, a friend of his, pull into the parking lot of the store. (R 1086).

John Thompson pulled into the store about six minutes after 7:00 a.m.

and parked next to a blue Ford. (R 1102). When he went inside, he saw Hardy, who was acting unusual, as if he had something else on his mind. (R 1106). Another man, not resembling Burr, stood at the back of the store by the cooler. (R 1109). He acted suspiciously, like he was just passing time. (R 1116).

Minnie Pompey, Domita Williams' mother, testified that on August 20th, Williams drove her to work about 6:30 a.m. (R 1156). Pompey worked at a day care center about a 20-minute drive from where she lived, and that morning, Pompey punched in at 6:56 a.m. (R 1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after 7:00 a.m., she started on the 20-minuted trip back home. (R 1158)

Shortly after 7:00 a.m., Ruth Grant and her daughter, Valerie, were heading west toward Florida State University along Highway 27. They passed the Suwanee Swifty and saw several police cars there. (R 1194). A short time later, they saw an ambulance heading towards the Suwanee Swifty and, seconds later, Domita Williams, a relative of theirs, passed, also apparently heading home. (R 1195).

Domita Williams then took the stand for the defense and recanted her previous testimony. (R 1266-1286). She testified that August 20, 1981, was the first day she had to report to work at the Sunland Training Center in Tallahassee. (R 1269). Because she did not have a car of her own, she drove her mother to work so she could use her mother's car. (R 1269). As she

returned home, she passed by the Suwanee Swifty store and saw several police cars there. (R 1270). She was at work by 9:00 a.m., and about 5:00 p.m., she saw Burr and he stayed with her that evening. (R 1271-1272).

On cross-examination, the following was revealed:

Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwanee Swifty the morning of the robbery/murder (R 1136, 1137; compare to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valerie Grant claimed they saw at the same time they saw Domita in her mother's car (R 1289); she admitted that when she gave her original

statement to Charlie Ash, she knew Katrine Jackson and Tammy Footman had previously given statements (R 1290-1291); she could not explain the "cheeseburger story" away . . . how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you get the chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted saying to threats were made when she gave her testimony (where no threats were made) was consistent with her statement (R 1296, 1297); she acknowledged that her grand jury testimony (where no threats were made) was the same (R 1297-1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before the trial (where no threats were made) and it was the same (R 1298-1299); she acknowledged that

Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after [she] found out they didn't have any evidence against [Burr]," that at that point she decided to "tell the truth" (R 1203-1304); that Mr. Meggs calmed her down and she agreed that her original statement was true (R 1304-1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she received a call from defense counsel after her original trial testimony and but for that call she did not "think" she would have returned and recanted her original

testimony (R 1307); she emphasized once again that she was scared of Burr, for herself, and for her baby (R 1307. 1308); and she denied ever discussing the Suwanee Swifty incident in the presence of Burr and Darrell Footman. (R 1309; compare to 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Burr's car at Williams' house between 6:30 a.m. and 7:00 a.m. on August 20, 1981. (R 1335). At 7:45 a.m., the car was gone. (R 1336, 1337).

Tammy Footman's testimony was proffered because it agreed that she had heard the previous days' testimony, but not Williams' recantation. (R 1320, 1322, 1324, 1325, 1342, 1352). Burr's counsel suggested the proffer and at its conclusion, admitted the testimony was

"along the lines of her statement." (R 1325, 1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior testimony and specifically stated that Williams told her the "cheeseburger story" the morning of the incident. (R 1357, 13588-1361).

Ray Wood testified taut the ambulance was already at the Suwanee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation. (R 1370-1373). He knew Williams had information after talking with Katrine Jackson and Tammy Footman, but he never told Williams what they had stated. (R 1376-1378). Williams'

mother was hostile (R 1375), and he got no response from her when he asked how she knew if her daughter knew something about the Suwanee Swifty incident. (R 1374, 1375). Ash denied ever threatening Domita Williams. (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmosphere of that statement. (R 1382, 1386). The State rested and all testimony concluded.

REASON FOR GRANTING THE WRIT

In Burr v. Florida, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988), this Court vacated the decision in Burr v. State, 518 So.2d 903 (Fla. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988), and remand to the Florida Supreme Court to further consider the case in light of Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 525 (1988).

The Florida Supreme Court following additional briefing and oral argument concluded that:

> ... Evidence of the collateral act for which Burr received an acquittal is inadmissible under Johnson. However, considering that the evidence of this collateral act was in addition to other evidence of guilt, we believe its admission, though erroneous, was harmless, that the error did not contribute to Burr's conviction in this case. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Burr v. State, 550 So.2d 444, 446 (Fla. 1989).

The Florida Supreme Court held, however, that as to the penalty phase the utilization of this similar fact evidence for which an acquittal had resulted, said error was harmful and therefore a new sentencing proceeding was mandated. Johnson v. Mississippi, supra, held "that the eighth amendment requires a stringent review of death sentences based in part on improper aggravating circumstances." Burr v. State, 550 So.2d at 446.

The record reveals that the similar fact evidence admitted during the guilt phase and utilized by the trial court to support, in part, the aggravating factors, was the "circumstances" of similar crimes, not the actual dispositions of

those crimes. The Florida Supreme Court totally confused the concept of the admission of similar fact evidence and the reasoning set forth in Johnson v. Mississippi, regarding the reliance of prior "invalid" convictions to support a death penalty.

Similar fact evidence does not require a conviction or an acquittal in order to permit the use of that evidence. Dowling v. United States, ___ U.S. ___ 3 F.L.W. Fed. S1026 (Decided January 10, 1990)(collateral estoppel does not bar the use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted). In Johnson v. Mississippi, supra, the Court is considering the propriety of the death penalty based on evidence of the "conviction", emphasized the distinction between an aggravating

factor supported by a subsequent invalidated "conviction" rather than an aggravating factor supported by the underlying conduct giving rise to the conviction. The Court observed that evidence of the underlying conduct may be considered by the sentencing authority even when the conviction itself may not. Johnson v. Mississippi, 108 S.Ct. at 1986, citing Zant v. Stephens, 462 U.S. 862, 887 N. 24 (1983).

Contrary to the Florida Supreme Court's opinion that "the aggravating factors of witness elimination to avoid arrest and cold, calculated, and premeditated were established almost entirely on the collateral crimes evidence. . .," Burr v. State, 550 So.2d at 446, the trial court's sentencing order provides:

My review of the evidence adduced during both phases of the trial persuades me that death is the only appropriate punishment in this case. In so concluding, I do not in any way depreciate the efforts of or question the feelings and motives that guided the majority of the fine conscientious men and women of the jury in their recommendation. As they saw their duty, they performed it admirably. Perhaps they will understand that I must now answer to the call of conscious and dictates of duty as I see that duty.

I find from the evidence that three aggravating circumstances have been established beyond a reasonable doubt. With the first and last of these the jury was not doubt in unanimous accord.

(1) The execution murder of Stephen Harty was committed by Charlie Lewis Burr while he was engaged in the commission of armed robbery of Stephen Harty.

(2) The execution of Stephen Harty was committed by Charlie Lewis Burr for the purpose of avoiding or preventing a lawful arrest for the armed robbery of Stephen Harty. By his conduct during the thirteen-day period which began with Stephen Harty's pitiless murder, Charlie Burr gave a forceful expression to the first principle of the code of the lawless that "dead men tell no tales". That Emil Ferrule, James

Griffin and Lloyd Lee live to identify him is no testimonial to his marksmanship. That they did not join Stephen Harty in the bounds of death can only be attributed to the grace of the benevolent creator.

(3) The murder of Stephen Harty was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt?

Against this backdrop of aggravating circumstances, try as I may to find mitigating circumstances from the evidence, I cannot.

As I close, I am not constrained to observe that if the Williams Rules testimony admitted during this trial is found to have been improperly admitted then the sentence I impose today will be academic. If it be determined that this proceedings, for all its twists and turns in search for elusive truth, has been fairly tried, there can be only one ultimate result. Lest it be later claimed that Charlie Burr received ineffective assistance of counsel, I should say that Mr. Thomas Keith made the very most with what he had to work with.

(TR 319-320).

Johnson v. Mississippi, supra, was never intended to undercut the availability or use of similar fact evidence either at trial or at the penalty phases with regard to evidence in support of statutory aggravating circumstances or to negate tendered mitigating evidence. Indeed, the Eleventh Circuit Court of Appeals, in Richardson v. Johnson, 864 F.2d 1536 at 1541-1542 (11th Cir. 1989), had no problem appreciating the dichotomy herein set forth. In Richardson v. Johnson, supra, wherein counsel was challenged for effectiveness, the court observed:

> Further, it is not clear that, had the attorney actively challenged the convictions, the result of Richardson's sentencing would have been different. Even if the sentencing judge could not rely on these North Carolina convictions because they were

unconstitutionally obtained, evidence of Richardson's past criminal "activity" would have been admissible if the sentencing judge had found such information reliable. See Tucker v. Kemp, 762 F.2d 1480, 1487 (11th Cir.)(en banc), vacated, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), reinstated, 802 F.2d 1293 (1986), cert. denied, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987)(when sentencing, court can consider evidence of criminal indictments and even evidence of criminal activity for which no charges have been filed if evidence is reliable); Cf. Williams v. Lynbaugh, 814 F.2d 205, 207-08 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987)(evidence of "unadjudicated criminal conduct," confirmed by witness, is admissible in capital sentencing trial).[11]

[11] Contrary to Richardson's suggestion at oral argument that Johnson v. Mississippi, ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), weakens the precedential value of Tucker v. Kemp, we find that Johnson supports this Court's language in Tucker. In Johnson, the Supreme Court reiterated its conclusion that sentencing may not be based on "factors

that are constitutionally impermissible or totally irrelevant to the sentencing process." 108 S.Ct. at 1986 (citing Zant v. Stephens, 462 U.S. 862, 887 n. 24, 103 S.Ct. 2733, 2748 n . 24, 77 L.Ed.2d 235 (1983). The court emphasized the distinction between a conviction subsequently rendered invalid and the underlying conduct that gave rise to the conviction, suggesting that evidence of underlying conduct may be considered by the sentencing authority even when the conviction itself may not be. Id.

864 F.2d at 1541-1542. (Emphasis added).

See also Jones v. Butler, 864 F.2d 348, 364-365, 370 (5th Cir. 1988), citing and distinguishing Johnson v. Mississippi, supra and Edwards v. Scroggy, 849 F.2d 204, 212-214 (5th Cir. 1988).

The sentencer, the trial judge, did not consider evidence that was revealed

to be materially inaccurate. As reflected by the factual recital presented at trial with regard to Charlie Lewis Burr being the perpetrator of three other robberies, the similar fact evidence admitted at trial went unchallenged. The sentencer knew not the results of the subsequent prosecutions, but rather bottomed a determination of criminal conduct on evidence surrounding these three other criminal endeavors. See Bryan v. State, 533 So.2d 744 (Fla. 1988).

Nothing resulting from Johnson v. Mississippi, supra, erodes the integrity of the trial judge's assessment that death was the appropriate sentence. The Williams Rule, similar fact evidence presented was properly admissible and properly considered by the trial judge at both the guilt and penalty phase of

this trial. To suggest that this "evidence" was flawed, simply because an "acquittal" obtained as to one of the robberies (based on a number of variables not related to the specific factors and when this evidence was admissible whether the case was prosecuted or not), is error.[1]

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[1] It should be further emphasized that while death is different, the notion of harmless error and the applicable standard is not. Even assuming, as the Florida Supreme Court did, that the Williams Rule evidence was inadmissible at the guilt phase, the harmless error analysis assigned its admission at the guilt phases must follow through to the penalty phase. Green v. Georgia, 442 U.S. 95 (1979), and Satterwhite v. Texas, 486 U.S. ___, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988).

CONCLUSION

Based on the foregoing, Petitioner would urge this Court to grant the petition and reverse the Florida Supreme Court's misapplication of Johnson v. Mississippi, supra, on remand.

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NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

STATE OF FLORIDA,

Petitioner,

v.

CHARLIE LEWIS BURR,

Respondent.

APPENDIX TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

Charles Lewis Burr v. State,
Florida Supreme Court
Case No. 71,234
November 15, 1989.....A-1

Charles Lewis Burr v. State,
Florida Supreme Court
Case No. 71,234
August 31, 1989.....A-3

SUPREME COURT OF FLORIDA

Wednesday, November 15, 1989

CHARLES LEWIS BURR,	*	
	*	
Appellant,	*	Case No. 71,234
	*	
v.	*	Circuit Court
	*	No. 81-1831
STATE OF FLORIDA,	*	(Leon)
	*	
Appellee.	*	

****

Appellee's Petition for Rehearing and Clarification filed in the above cause is hereby denied.

OVERTON, MCDONALD, BARKETT and KOGAN, JJ., concur

EHRLICH, C.J., SHAW and GRIMES, JJ., dissent.

TC

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Charles E. Miner, Judge

Steven J. Seliger, Esquire
Carolyn M. Snurkowski, Esquire

A True Copy
TEST:

/s/
Sid J. White
Clerk, Supreme Court

SUPREME COURT OF FLORIDA

NO. 71.234

CHARLES LEWIS BURR, Appellant,

vs.

STATE OF FLORIDA, Appellee.

(August 31, 1989)

PER CURIAM.

We review this case following a remand from the United States Supreme Court. We have jurisdiction. Art. V, §3(b)(1), Fla. Const. We deny Burr's request for a new trial, but vacate his sentence and remand this case to the trial court for resentencing before the trial judge.

Burr was convicted in June 1982 of the first-degree murder of a convenience store clerk in Leon County, Florida, and

sentenced to death. At trial, the state called three other convenience store clerks to testify that Burr had robbed their stores in a manner similar to the robbery alleged to have occurred in this case. All three clerks identified Burr as the perpetrator of the crimes, although Burr was subsequently acquitted of one of the crimes, and the state nolle prossed another.

This Court affirmed the sentence and conviction on direct appeal, Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985). In 1987, the Governor signed a death warrant setting Burr's execution and Burr filed for relief in the circuit court pursuant to Florida Rule of Criminal Procedure 3.850. The circuit court denied relief, and this Court affirmed, Burr v. State,

518 So.2d 903 (Fla. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988). A stay of execution was granted by the federal court. The United States Supreme Court vacated our decision and remanded the case to us for consideration in light of its opinion in Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Burr v. Florida, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988).

In Johnson, the defendant was convicted of murder and sentenced to death on the basis of three aggravating circumstances, including a 1963 conviction of a prior violent felony in New York. Subsequent to the conviction and direct appeal in that case, Johnson's New York conviction was vacated by the New York Court of Appeal.

Johnson then attacked his death sentence by collateral review in the Mississippi courts. The Mississippi Supreme Court denied relief, holding that the claim was collaterally barred and that a subsequent change in the admissible nature of evidence could not be a basis for finding that the death sentence was improperly imposed. The United States Supreme Court reversed, holding the claim was properly raised on postconviction motion and was not procedurally barred, and the eighth amendment prohibits the imposition of a sentence of death based upon a conviction no longer in existence.

The case before us involves similar issues with significantly dissimilar facts. Burr's conviction and sentence were based, in part, on evidence admitted pursuant to Williams v. State,

110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The evidence that Burr had committed crimes similar in nature and method to the crime he was alleged to have committed in this case was relevant to establish identity and intent. Burr, 466 So.2d at 1053. A conviction for other crimes, wrongs, or acts has never been a prerequisite for the admission of evidence of those acts, so long as the evidence is relevant to some issue other than bad character or propensity. § 90.404(2)(a), Fla. Stat. (1981). Therefore, it is not relevant during the guilt phase that the convictions were not obtained against Burr for the other three crimes. Evidence of the collateral act for which Burr received an acquittal is inadmissible under Johnson. However, considering that the

evidence of this collateral act was in addition to other evidence of guilt, we believe its admission, though erroneous, was harmless. We believe, beyond a reasonable doubt, that the error did not contribute to Burr's conviction in this case. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Our review of the record reveals that the state introduced no evidence at the sentencing phase beyond that established at the guilt phases. There was no evidence of two of the three aggravating factors other than the collateral crimes evidence.[2] The United States Supreme Court held in Johnson that the eighth amendment requires a

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[2] Because we are reversing Burr's sentence, we express no opinion on the issue of the weight, if any, evidence of collateral acts should be given in proving the aggravating circumstances applicable in a particular offense.

stringent review of death sentences based in part on improper aggravating circumstances.

In overriding the jury recommendation for life, the trial judge found as aggravating circumstances that the murder was committed to avoid arrest; that it was committed during the course of a robbery; and, that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The aggravating factors of witness elimination to avoid arrest and cold, calculated, and premeditated were established almost entirely on collateral crimes evidence.[3] We cannot

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[3] The medical examiner did testify to the manner in which the crime may have been committed, but his testimony is equivocal, at best, and falls short of establishing beyond a reasonable doubt that the crime was committed in a cold,

say, beyond a reasonable doubt, that the consideration of this evidence did not contribute to the sentence, particularly in light of the jury's recommendation of life.

We reject the notion that the one instance of collateral conduct for which Burr was acquitted was merely cumulative of the other two instances presented at trial. We have no way to determine the weight given each witness' testimony. As the reviewing court it is not our function to weigh the credibility of each witness, but rather, it is that of the trial judge. Nor can we determine whether the one improperly admitted

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calculated, and premeditated manner or that the motive of the murder was for witness elimination to avoid arrest. Burr v. State, 518 So.2d 903, 907-09 (Fla. 1987)(Barkett, J., dissenting), cert. granted, ___ U.S. ___, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988).

instance of collateral conduct was determinative of the outcome.

Accordingly, we vacate the sentence of death and remand this case to the trial court for a new sentencing determination. Because the jury recommended a life sentence at the original sentencing phase, a new jury need not be impaneled.

It is so ordered.

EHRLICH, C.J., and OVERTON, MCDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.